

sity for construction. Therefore, in answer to your first question, it is my opinion that there is no necessity for the present General Commission of the State Board of Education to adopt new standards by new rules if the General Commission, in its discretion, should decide to permit the previous standards and rules to remain in force. This statute was effective as of March 5, 1945. As to all persons named or referred to, the payment is to be computed on a pro rata basis for the unexpired part of the 1945 calendar year.

2. Your second question contains two parts. The first sentence purports to grant permissive authority to grant an additional unit to each county board of education. The statute says it "shall" be granted. No administrative board has authority to adopt a rule contrary to the provisions of the statute. *Wallace v. Donner* (1929), 89 Ind. App. 416, 420. Therefore, the first sentence of the rule is void. The second part of the rule quoted is also of no effect, for it merely purports to say the same thing the statute does. When a rule only states in different language what the statute already provides, it is of no force whatever.

3. My answer to question number two makes it unnecessary to consider your third question since it is hypothetical and purely moot.

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OFFICIAL OPINION NO. 93

August 30, 1945.

Hon. Clement T. Malan,  
State Superintendent of Public Instruction,  
State House,  
Indianapolis 4, Indiana.

Dear Sir:

Your letter of August 4, 1945, received requesting an official opinion upon the following questions:

"The 1943 Legislature passed an emergency act extending the retirement age of a teacher two years, which emergency legislation was re-enacted by the 1945 Legislature extending the retirement until 1947.

“A tenure teacher under the 1927 Law, transferred to the 1939 Retirement Law, reaches his 66th year. Is said teacher still on tenure under Chapter 71 of the acts of 1945?”

Section 28-4506 Burns' 1943 Supplement, Clause (d), same being Section 2, Chapter 189, Acts 1937, provides in part as follows:

“(d) Age Limit — Eligibility — Agreement. No teacher who has received credit under this act for thirty-five (35) years of service shall be further assessed. Every teacher who is employed to teach in the public schools of this state and who avails himself or herself of and accepts the provisions and privileges of this act, shall, by virtue of such acceptance, agree that (1) when such teacher shall have attained the full age of sixty-six (66) years, he or she shall not be employed to teach and shall not be eligible to continue to teach in any of the public schools of any school corporation of this state, and (2) that such teacher will be ineligible to enter into any contract with any school corporation to teach in any of the public schools thereof. \* \* \*”

The foregoing provision of the statute according to its terms became effective July 1, 1939.

By Chapter 193 of the Acts of 1943 (found in the footnote to Section 28-4506 Burns' 1943 Supplement) the Legislature suspended until May, 1945, the provisions of Section 28-4506 (d), *supra*, requiring teachers to retire under the Teachers' Retirement Act at the age of sixty-six (66) years. This statute was a new Act and did not purport to be an amendatory Act of the teachers' retirement statutes. Chapter 193 of the Acts of 1943 was amended by Chapter 71 of the Acts of 1945, which contained an emergency clause and was in full force and effect when signed by the Governor on February 28, 1945, and provides under Section 1 thereof as follows:

“That for the duration of the present war and for six months thereafter, but not later than the first day of May, 1947, the following provisions of paragraph (d) of section 2 of Chapter 189 of the Acts of the 1937 General Assembly of Indiana, to-wit: Every teacher

who is employed to teach in the public schools in this state and who avails himself or herself of and accepts the provisions and privileges of this act, shall, by virtue of such acceptance, agree that (1) when such teacher shall have attained the full age of sixty-six years, he or she shall not be employed to teach and shall not be eligible to continue to teach in any of the public schools of any school corporation of this state, and (2) that such teacher will be ineligible to enter into any contract with any school corporation to teach in any of the public schools thereof, be and the same are hereby suspended. *Provided*, that during the period of time of the suspension of Section 1 of this act, as herein provided, any school corporation of this State may, but shall not be required to, thereafter continue in its employ, after the expiration of any current school year, any teacher who shall have attained the full age of sixty-six years."

In the case of *Engel v. Mathley* (1943) — Ind. —, 48 N. E. (2d) 463, the court in ruling on the tenure status of a township teacher who had been denied continued employment by the township trustee because she was a married teacher, specifically held on page 465 of the opinion that the amendment of 1933 to the teachers' tenure statute of 1927 did not affect the tenure status of township teachers acquired under the 1937 law.

In the last referred to case the court on page 467 of the opinion further holds that the limitation of a tenure contract to sixty-six (66) years by the 1933 amendment did not affect such township teacher's tenure contract acquired under the 1927 law. However, it is important to note that in this decision the Supreme Court on pages 466 and 467 of the opinion at great length discusses the successive steps taken by the teacher in accepting independent employment while her tenure contract was refused her by the trustee, and her subsequent yearly employment by the township in which she had a tenure contract, to determine whether she in fact had abandoned her tenure contract or whether she had been guilty of such laches under the circumstances which would be sufficient to act as an implied waiver by her of her tenure contract and an acquiescence in its cancellation.

The case of *Engel v. Mathley, supra*, therefore implies that such tenure teacher could have abandoned or waived said tenure contract by positive action.

Attention is called to the fact that in 1945 the Legislature amended the 1937 Teachers' Retirement Law (Section 28-4506 Burns' 1943 Supplement, *supra*), by Chapter 328 of the Acts of 1945. The pertinent part of such Act as amended is contained in Section 2, Clause (d), thereof, which suspends the operation of the aforesaid sixty-six (66) year retirement requirement, to July 1, 1947, for any teacher electing to become a member of said Fund under said 1945 Act. This statute did not provide for the refusal of teachers' contracts to teachers over sixty-six (66) years of age, in the discretion of the school corporation.

I am of the opinion Chapter 71 of the Acts of 1943, *supra*, and Chapter 328, Acts of 1945, *supra*, when construed in *pari materia* with each other are both suspension statutes of the sixty-six (66) year retirement provision. That they are not in conflict with each other and that full force and effect may be given to the provisions of each of said statutes.

From the foregoing I am of the opinion a tenure teacher under the 1927 law who elected to come under the provisions of the 1939 retirement law and who reached his sixty-sixth year after May 1, 1945, is subject to the provisions of Chapter 71 of the Acts of 1945, *supra*, and may be refused a teacher's contract by the school corporation with which he held such tenure status. This is true due to the teacher's waiver of his tenure teacher contract when he elected to come under the provisions of the 1939 Teachers' Retirement Act.

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OFFICIAL OPINION NO. 94

August 30, 1945.

Hon. Ralph B. Wiley, Chairman  
Stream Pollution Control Board,  
1098 West Michigan Street,  
Indianapolis 7, Indiana.

Dear Sir:

I am in receipt of your letter of August 10th, requesting my official opinion upon the following question: